*344 HM Revenue & Customs v Viewtopia Ltd

Supreme Court Costs Office

21 July 2005

[2006] 2 Costs L.R. 344

Before: P R Rogers , Costs Judge

21 July 2005

Headnote

The costs judge in this Central Funds case considered the interrelationship of Rules 12 to 14 of the Crown Court Rules and the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 , and commented that the assessment of civil costs in the Crown Court had still not been assimilated fully into the civil basis of assessment, and thus affirmed the decision of the Determining Officer.

Reasons for Decision

Background

1 Viewtopia Ltd import and distribute adult (not pornographic) magazines and this case arose out of the importation of magazines from their distributor or wholesaler in South Africa. They ordered a large quantity of magazines which would have filled 20 pallets. The South African distributors were also distributors of cigarettes on a large scale and what happened was that when filling the order made by Viewtopia they accidentally included with the magazines a substantial quantity (some 320,000) cigarettes. Indeed the mistake *345 seemed to have been compounded because some of the magazines which should have been sent to England were in fact sent to the purchaser of the cigarettes in South Africa.

2 The pallets were sent by sea and arrived at Tilbury docks on 10 October 2002 where they were inspected by HM Customs who seized them prior to applying to magistrates for an order condemning both the books and cigarettes pursuant to s 139 Customs & Excise Act 1979 .

3 Mr William Cooke of Viewtopia disputed the Customs and Excise claim to the magazines and there was a hearing before the magistrates on 13 January 2004 at which the District Judge (Magistrates' Court) ordered the goods to be forfeited and for the respondent, that is Viewtopia Ltd, to pay to HM Customs & Excises costs, totalling £9,150. It is not clear whether those were assessed by the district judge or agreed between the parties, but in the event it of course does not matter.

4 Even in the magistrates' court Viewtopia took the matter seriously and actually produced evidence from a witness in South Africa to explain that there had been an error. At the magistrates' court the company Viewtopia Ltd was represented by Mr Goldkorn, a solicitor-advocate with Higher Court advocacy rights.

5 Dissatisfied with the condemnation order made by the magistrates' court, Viewtopia Ltd appealed to the Crown Court. The case was eventually listed for three days in April 2004, but when it was called on HM Customs & Excise were not represented at all. The court made enquiries and the Customs & Excise responded that they had had no notice of the listing. Later that afternoon junior counsel appeared and maintained the position and also submitted to the Crown Court, which consisted of a Crown Court judge and two magistrates, that this was a serious matter because the District Judge (Magistrates) had found evidence of organised smuggling. The team representing Viewtopia at that hearing, which consisted of Mr Goldberg QC and Mr Goldkorn, objected to that material being put before the court and asked that court to recuse itself from hearing the appeal, which they did.

6 Ultimately the case came before a differently constituted Crown Court again consisting of a Crown Court judge, Judge Lockhart, and two magistrates, and, after a five day hearing, the appeal was successful, and the condemnation order was quashed. The order for ***346** payment of costs by Viewtopia to HM Customs & Excise was also quashed and the court made the following order in respect of costs:

> "The respondent [that is HM Customs & Excise] is to pay the appellant's costs of all Crown Court proceedings and the hearing in the court below subject to a detailed assessment under Rule 14 of the Crown Court Rules 1982 if not agreed between the parties."

The Taxation Below

7 Those costs could not be agreed, and the matter was brought before a member of the Central Taxing team Mr Uppard sitting at Bloomsbury. After determination and redetermination he assessed the costs payable under that order at just over £71,000. For the purposes of the hearing before me, the exact amount was not in issue since the appeal was brought before me by Customs & Excise on the basis that Mr Uppard had determined costs on the wrong basis and indeed on a basis not known to the courts, and accordingly asked for a ruling as to the correct basis upon which those costs should be assessed. The hope was expressed that once that ruling was given the parties could quickly resolve their differences.

8 Mr Goldkorn, who represented the respondents to the appeal, contended that there was no jurisdiction for me to hear the appeal, but that in any event the Determining Officer had correctly assessed the costs.

The Regulatory Provisions That I Considered

9 I was asked to consider in detail Rules 12 to 14 of the Crown Court Rules 1982 , and also reg 51 of the Crown Court (Confiscation, Restraint and Procedure) Rules 2003 . I set these out below:

> **"Crown Court Rules 1982, Part IV**
>
> 12 **Jurisdiction to award costs**
>
> 12
>
> (1) Subject to the provisions of s 109(1) of the Magistrates' Courts Act 1980 (power of Magistrates' Courts to award costs on abandonment of appeals from Magistrates' Courts) and ss 22(4) and 81B(4) of the Licensing Act 1964 (application of s 109(1) of the Act of 1980 to appeals under ss 21 and 81B of the Act of 1964), no party shall be entitled to recover any costs of any proceedings in the Crown Court from any other party to the proceedings except under an order of the court. ***347**
>
> (2) Subject to s 4 of the Costs in Criminal Cases Act 1973 and to the following provisions of this Rule, the Crown Court may make such order for costs as it thinks just.
>
> (3) In the case of an appeal under s 21 [or 67B] of the Licensing Act 1964 –
>
> (a) no order for costs shall be made on the abandonment of an appeal by giving notice under Rule 11;
>
> (b) no order for costs shall be made against a person who appeared before the

licensing justices and opposed the grant of the justices' licence unless he appeared at the hearing of the appeal and opposed the appeal;

(c) if the appeal, not being an appeal against the grant of a justices' licence, is dismissed, the court shall order the appellant to pay to the justices against whose decision he has appealed, or such person as those justices may appoint, such sum by way of costs as is, in the opinion of the court, sufficient to indemnify the justices from all costs and charges to which they have been put in consequence of his having given notice of appeal.

14. **Taxation**

14.

(1) Where under these Rules the Crown Court has made an order for the costs of any proceedings to be paid by a party and the court has not fixed a sum, the amount of the costs to be paid shall be ascertained as soon as practicable by the appropriate officer of the Crown Court (hereinafter referred to as the taxing authority).

(2) On a taxation under the preceding paragraph under s 4(2) of the Costs in Criminal Cases Act 1973 , there shall be allowed the costs reasonably incurred in or about the prosecution and conviction or the defence, as the case may be.

The Crown Court (Confiscation, Restraint and Receivership) Rules 2003

Assessment of costs

51. –

(1) Where the Crown Court has made an order for costs in restraint proceedings or receivership proceedings it may either –

(a) make an assessment of the costs itself; or ***348**

(b) order assessment of the costs under rule 14 of the Crown Court Rules 1982 .

(2) In either case, the Crown Court or the taxing authority, as the case may be, must –

(a) only allow costs which are proportionate to the matters in issue; and

(b) resolve any doubt which it may have as to whether the costs were reasonably incurred or reasonable and proportionate in favour of the paying party.

(3) The Crown Court or the taxing authority, as the case may be, is to have regard to all the circumstances in deciding whether costs were proportionately or reasonably incurred or proportionate and reasonable in amount.

(4) In particular, the Crown Court or the taxing authority must give effect to any orders which have already been made.

(5) The Crown Court or the taxing authority must also have regard to –

> (a) the conduct of all the parties, including in particular, conduct before, as well as during, the proceedings;
>
> (b) the amount or value of the property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the application; and
>
> (g) the place or the circumstances in which work or any part of it was done."

10 Reference is also made to the CPR and the Woolf Report, I will need to refer to that a little later in these reasons.

11 Mr Bacon, who ably presented the appellant's arguments, firstly criticised the court for not making an order, in which it was as clear as it could be, the basis upon which the costs should be assessed, and secondly the determining officer for the use of imprecise language.

12 Dealing first with the language used by the determining officer, ***349** I regret that it does seem to be unfortunate that he was not a little more careful in his use of language.

13 I was firstly referred to the letter which he wrote to both parties after he had determined the costs, which letter was dated 27 January 2005, and reads in part as follows:

> "I have carefully considered Mr R Bacon's representations in his letter of 22 November 2004 and Mr Goldkorn's response dated 6 December 2004. I have come to the conclusion that the Crown Court (Confiscation Restraint and Receivership) Rules 2003 do not in my view apply to condemnation proceedings under the Customs & Excise Act 1979 . As such the standard basis does not strictly apply to the assessment of the applicant's claim.
>
> However I accept that although the Crown Court Rules do not apply, the costs claimed by Goldkorn's on behalf of Viewtopia should be **reasonable and appropriate** to the seriousness and effect on the appellant. [The words do not appear in bold in the letter]. The appellant was a responsible company and the allegations of smuggling were very serious and potentially could have resulted in the demise of the company and lost the livelihood for those involved."

14 Following receipt of that letter both parties wrote to and addressed the determining officer as to the basis upon which he had apparently determined costs, and asked him to decide as a preliminary issue "the basis upon which they should be decided", but in fact the determining officer decided not to do that, but to assess the costs in the figure mentioned above.

15 The determining officer's written reasons are unfortunately not dated, but appear to have been received by both parties on 12 April 2005. On the first two pages the determining officer recited the 18 documents which he had considered, and briefly summarised the facts and then said this:

> "The issue is essential (sic) whether the bill of costs on behalf of Viewtopia Ltd have been (sic) been correctly drawn. In A & M Bacon's view on behalf of Customs & Excise is that the bill should be drawn in accordance with the Crown Court Rule 14(2) i.e. on the standard basis and should be proportional. Goldkorns argue that the Crown Court Rules do not apply since they were condemnation proceedings and are not covered by the Crown Court (Confiscation and Receivership) Rules 2003 ***350*** . Therefore the bill of cost (sic) does not have to be drawn on this standard basis. My view as set out in my letter of 27 January 2005 is that the 2003 rules above cannot apply and therefore the appellants are not constrained by them. My view is that although the rules do not apply the bill on behalf of Goldkorn should be reasonable and should take account of the seriousness of the appellant. I reiterate this was a very serious matter to the appellants. Not only were the value of the goods condemned substantial (sic) the effect on the company of an adverse finding could be very serious …"

The Legal Argument in Relation to Wasted Costs

16 In the course of the submissions Mr Goldkorn drew my attention to the transcript of the argument in relation to wasted costs which was put to Judge Lockhart at the end of the Crown Court appeal on 18 June 2004. This is a lengthy document, running to at least 14 pages, but effectively Mr Goldkorn was seeking an order for indemnity costs and interest at 10% on the costs wasted as a result of the failure of the Customs & Excise to be represented at the initial Crown Court hearing. In order to make good that claim it was his submission that the CPR in general, and Part 36 in particular, were, by implication, imported into the civil proceedings in the Crown Court.

17 Mr Aylen QC, on behalf of HM Customs & Excise, decisively, to my view, demonstrated to the judge that those rules did not apply being expressly excluded under para 2.1 of CPR , whereupon Mr Goldkorn was forced back into the secondary argument that, even if that was right, nevertheless the Crown Court judge had power under Rule 12 of the Crown Court Rules 1982 to award costs on the indemnity basis, and effectively to import the CPR rules in general, and Part 36 in particular, into his order.

18 The judge's ruling is as follows:

> "Judge Lockhart. I do not consider that I have power to make an order for indemnity costs. I do not consider either that it falls to me to give the sort of indication that I am being invited to give to the taxing officer to adopt a certain policy in the way the case is assessed and taxed by him. The order that we are prepared to make is that the costs in the magistrates' court and throughout in the Crown Court of the defendant be taxed and paid on the **normal basis by the Crown** , and that the sum of £9,150 be returned to the appellant." [Again the bold is put in by me and does not of course appear in the judge's ruling.] ***351***

Decision

19 I think it is fair to say that the Crown Courts have not really come to terms with their very limited civil jurisdiction, and therefore have not developed a clear pattern or policy for dealing with costs arising out of such claims. Indeed the recent case of *John Sutton v Horsham District Council [2005] 2 Costs LR 344* illustrates this point rather well. That case concerned the case of an abatement notice in respect of smoke from a chimney, and, as the judgment makes clear, there was a degree of confusion involving everybody, including the two Crown Court judges as to whether the subsequent proceedings were criminal or civil. In the end I concluded that the proceedings were effectively civil proceedings:

> "21. It is clear however that so far as this case is concerned, the proceedings were conducted throughout the Crown Court as civil proceedings. Mr Sutton opened and led

> his evidence, put himself in the witness box and thereafter cross-examined the defendant's witnesses and closing speeches were made to the Crown Court, in the order which one would expect for a civil case of this nature.
>
> 22. It is of course true that the subject matter of the proceedings was an abatement notice, which carries criminal penalties, in that if it had been upheld and Mr Sutton had not complied with it, then he could be liable ultimately to imprisonment and, indeed, other criminal sanctions.
>
> 23. It seems to me that this is a sort of hybrid situation, in that the proceedings are civil but that the assessment of the costs of those proceedings is to be determined as if they were criminal proceedings."

20 The claimant had produced a bill of costs in respect of his successful appeal to the Crown Court, but I reluctantly held that he was unable to recover as a litigant in person because whilst the relevant section of the Litigants in Person (Costs & Expenses) Act 1975 had in 2001 been extended to civil proceedings in the magistrates' court, that extension did not extend further to cover any appeals from such proceedings in the magistrates' court to the Crown Court.

21 Fortunately this particular problem does not arise in this case, because both parties are agreed that these are civil proceedings in contrast with confiscation, restraint and receivership proceedings under the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 ***352** .

22 However the problem still remains as to the basis upon which, that being accepted, the subsequent costs should be assessed. Mr Bacon in his attractive argument submitted that whilst there was no direct authority on the point it was reasonable to draw an analogy with Rule 51 of the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 , which I have quoted above.

23 It is clear from the wording of reg 51 , and in particular reg 51(2), 51(3) and 51(5) , that there has been an attempt to bring the assessment of these costs into line with civil proceedings in the High Court which is subject to the CPR . The wording adopted is very similar, though not identical to that adopted in the relevant practice direction in relation [to] the CPR .

24 Again it is clear that in the consolidating Practice Direction issued by the Lord Chief Justice in relation to criminal costs on 18 May 2004, and reported at [2004] 1 WLR 265 , a determined attempt has been made to assimilate the assessment of costs where they are payable in the Crown Court to the way they are assessed in the High and County Courts under CPR .

25 Part (VII) of that Practice Direction is headed "Award of costs between the parties". Again the wording used in VII 2.1 through to 2.14 clearly reflect[s] the close analogy with civil proceedings.

26 Mr Goldkorn on the other hand, apart from a preliminary point which I will return to in a moment, maintains that there is no requirement under ss 12 to 14 of the Crown Court Rules for costs to be assessed on any particular basis other than that laid down in those Rules. Mr Bacon conceded that if I were to hold that the standard basis was applicable, it would have to be the standard basis as it stood in 1982 and not as it stands post 1998, and that would [have] excluded Lownds v Home Office type considerations, and, as such, that maybe the same result might be achieved since it is arguable that the RSC as it stood in 1982 effectively incorporated the same tests as those introduced into CPR by Lownds v Home Office .

27 The difficulty I have with Rule 14 which governs this assessment is that it is clearly worded in relation to a criminal matter, since it uses the words:

> "There shall be allowed the costs reasonably incurred in or above the prosecution and conviction or the defence as the case may be."

28 There is no assistance given to the taxation authorities as to how they proceed in such a matter. I accept that Rule 12 enables the judge ***353** in making the costs order to, at the very least, give guidance as to the exercise by use of the words "the Crown Court may make such

order for costs as it thinks just".

29 However, what I have to consider is the actual wording of the order made by the Crown Court judge, Judge Lockhart:

> "The respondent do pay the appellant's costs of all Crown Court proceedings and the hearing in the court below subject to a detailed assessment under Rule 14 of the Crown Court Rules 1982 , if not agreed between the parties."

30 It is clear from the ruling of Judge Lockhart, which I have quoted above, that he was urged to give at least an indication to the taxing officer as to how he should proceed. In criminal cases this not infrequently happens. In particular if, in the opinion of the judge, counsel has done a particularly good job the judge may recommend to the determining officer that he should deal with counsel's fee claim sympathetically in the light of any comments the judge may make. However, it is established law that whilst the determining officer must have regard to any such guidance, he is in no way bound by it, since he alone is to assess the costs.

31 In this case, of course, although there is an express and indeed lengthy argument about this very issue, the judge not only refused to make an order for indemnity costs, but also refused to give any sort of guidance to the determining officer as to how he should proceed.

32 Before I deal with the approach of the determining officer I should mention the argument advanced by Mr Goldkorn that there is some sort of estoppel which prevents Mr Bacon from raising the point which he now raises. It is suggested that the argument leading to the ruling before Judge Lockhart effectively decided the issue, and that it is not open to Mr Bacon to reopen that issue before me, or indeed for that matter before the determining officer. I reject that submission. It seems to me that [the] Crown Court judge, for whatever reason, was refusing to give any guidance to the determining officer as to how he should proceed. In those circumstances if one party to the assessment considers that the determining officer has misdirected himself, and in some way dealt with the case on the wrong basis, then they must have under the Crown Court Rules the unrestricted right to bring the matter before a costs judge having obtained written reasons from the determining officer, which of course happened in this case. ***354***

33 The vital question I have to consider and decide is whether the determining officer, in the absence of any guidance either from the Crown Court judge or from the wording of the Regulations, has misdirected himself in coming to the conclusions that he did.

34 In the Determining Officer's letter of 27 January 2005 the last sentence of the first paragraph ends:

> "As such the standard basis does not strictly apply to the applicant's claim."

35 The letter then continues in the next paragraph:

> "However, I accept that although the Crown Court Rules do not apply the costs claim by Goldkorns on behalf of Viewtopia should be reasonable and appropriate to the seriousness and effect on the appellant …"

36 I am satisfied that although the Determining Officer says, in the second paragraph, that the Crown Court Rules do not apply, he is effectively referring to the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 . He cannot be referring to the Crown Court Rules 1982 , because the order expressly says that they are to govern this assessment.

37 Mr Bacon attacks the addition of the word "appropriate" in that paragraph, which he says nowhere appears in the standard basis of assessment. Whilst I accept that it does not so appear, but since in my judgment that is not imported into this assessment, that in my view does not fatally undermine the determining officer's reasoning.

38 It must be remembered that the letters of January 20 and March 5 gave indications of the way

the determining officer's mind was working, but it is the reasons he gives in his letter received on 14 April 2005 which have to be construed, because these comprise his written reasons.

39 In the penultimate paragraph of that letter it is clear that the reference to the Crown Court Rules is indeed a reference to the 2003 Confiscation, Restraint and Receivership Rules . The letter goes on to explain his reasoning for the decisions which he had taken earlier in the assessment, and emphasised in that paragraph the points that seemed to him to be important in coming to his decision.

40 It seems to me that, faced with an almost impossible situation, this Determining Officer did effectively apply a test which seems to me to be a “reasonable test” and as set out in that paragraph of that letter. ***355**

41 Accordingly, I do not think that there is any evidence of misdirection in the approach which the determining officer has adopted, and, for the reasons I have already given, I reject Mr Bacon's submission that the costs should be re-assessed on the standard basis, nor any variation which have *[sic]* been incorporated by Rules and decided cases.

42 It may of course be that the Crown Court Rules ought to have been made expressly subject to the CPR , and as with the non-extension of the 1975 Litigants in Person Act, to civil proceedings in the Crown Court. There may have been an oversight by the Draftsman that the Crown Court Rules have not been assimilated into the CPR scheme so that Determining Officers and on appeal costs judges have to grapple with the consequential problems that causes. This appeal, which is an interlocutory appeal, accordingly fails, and, subject to any representations that the parties may wish to make to me it seems to me that the appellants must pay the respondent's costs of that exercise.

The Way Ahead

43 In the light of that decision whether the appellants wish me to revisit individual items in the bill, which is their right, must be a matter for their careful consideration. I would however say that although the costs in this matter are not negligible compared with most civil cases they are relatively small, and I would hope that when they have read this judgment the parties may be able to compromise their differences without a further hearing, except perhaps to resolve the question of the costs of the hearing before me on June 27, though, even here, I would hope that common-sense might prevail, and that a compromise could be reached.

Postscript

44 I have ignored the supplementary submissions which both sides sent in after the oral hearing before me on June 27; as already notified to the parties, this is because those submissions are too late.

45 Paragraphs 12–15 of the Crown Court Rules have now been superseded by Rule 78 of the Criminal Procedure Rules 2005 but the opportunity was unfortunately not taken to assimilate the procedure either with the CPR procedure or that under the Crown Court (Confiscation, Restraint and Receivership) Rules 2003 . ***356**